UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re	:	
AMIN HASAN and	:	Chapter 13
MATEEN HASAN,	:	Case No: 02-51367
	:	and 00-51236
Debtors	:	

APPEARANCES:

David L. Gussak, Esq., Keith Fuller, Esq. Reiner, Reiner & Bendett 160 Farmington Ave. Farmington, CT 06032	:	Attorneys for Bank of America
Molly T. Whiton, Esq. 10 Columbus Blvd., 6th floor Hartford, CT 06106	:	Chapter 13 Trustee
Amin and Mateen Hasan 93 Greenwood Ave. Bethel, CT 06808	:	*Pro se*

ORDER DISMISSING CASE WITH PREJUDICE
AND IMPOSING SANCTIONS AGAINST THE DEBTORS FOR CAUSE SHOWN

Alan H.W. Shiff, Chief Judge:

On October 5, 2000, Amin and Mateen Hasan ("debtors") filed their second of three chapter 13 cases, *i.e.*, case no. 00-51236 (the "second case").[1] On October 20, 2000, they filed a plan which disclosed a $15,862.92 mortgage arrearage owed to Bank of America ("bank"). On November 16, 2000, the debtors filed a proof of claim on behalf of the bank, asserting that it was the holder of a secured claim in the amount of $15,862.92. *See* Rule 3004, F.R.Bankr.P. On that date, their plan was confirmed. On December 8, 2000, the

[1]The debtors' first chapter 13 case, 96-51389, was filed on August 20, 1996. Their attorney in that case withdrew on November 25, 1997. It remained open until December 9, 1999.

bank filed a proof of a secured claim in the amount of $54,037.88 which superseded the debtors' proof of claim. *See id.,* Rule 3002(c), F.R.Bankr.P., and claim no. 7.

On April 23, 2001, the bank filed a motion for relief from the automatic stay, so that it could continue a foreclosure action in the state court. That motion was denied for the reason that the bank was bound by the debtors' confirmed plan. *See* 11 U.S.C. §1327(a). On appeal, the district court vacated the confirmation order because the bank had not been "placed on *unambiguous notice* prior to the confirmation hearing that its claim would be significantly diminished." The case was remanded for further proceedings. *Bank of America v. Hasan*, slip op. at 6-7, case no. 3:01cv1071 (D. Conn. February 1, 2002) (Covello, C.J.) (emphasis in original)*, appeal dismissed,* case no. 02-5022 (2nd Cir. May 23, 2002).

On April 18, 2002, this court conducted a hearing in response to the district court's remand order for the purpose of scheduling a trial on the debtors' objection to the bank's claim.[2] The debtors filed an appeal from the scheduling order that entered on that date. The appeal inaccurately stated that the scheduling order had effectively ruled on their objection to the bank's claim, in a footnote which referred to that claim as secured.

On September 11, 2002, the court conducted a second hearing for the purpose of scheduling a trial in response to the district court's remand order. The debtors objected, contending that this court was without jurisdiction to consider their objection to the bank's claim because of their "pending" appeal from the first scheduling order. *See* case no. 02 CV 1012 (D. Conn.) (Egington, J.). However, a review of the district court record demonstrated that the debtors neither sought nor obtained permission to file an interlocutory appeal. Accordingly, this court concluded that the appeal was not viable. *See September 11, 2002 hearing record* at 11:51. Indeed, the appeal was dismissed on November 12, 2002.

Thereafter, the court inquired as to whether the parties were ready to proceed. The bank stated that it was. The debtors stated that they would never be ready. The court directed the bank to file a proposed pretrial order on the debtors' objection to its claim. *See September 11, 2002 hearing record* at 11:59, 12:23, and *trial transcript at* 8. The

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[2]It is noted that the debtors challenged the bank's claim in its entirety, notwithstanding their earlier assertions that the claim was secured. *See supra* at 1.

court entered a pretrial order on October 7, which, *inter alia,* required each side to exchange a list of witnesses and exhibits by October 28 and scheduled an October 30 trial.

On the morning of the trial, the debtors filed a recusal motion, which was denied as untimely. *See U.S. v. Durranti,* 835 F.2d 410, 427 (2nd Cir. 1987) ("charges of impropriety or bias are serious . . . Nevertheless, motions to disqualify must be timely . . . to safeguard both the judiciary from frivolous attacks upon its dignity and the court system from last-minute dilatory tactics."); *In re United States of America*, 666 F.2d 690, 695 (1st Cir. 1981) ("the potential waste of judicial resources alone requires that a motion for disqualification be timely filed."). *See also trial transcript* at 9-10.

The court further rejected the debtors' argument that their objection to the bank's claim should be considered in the context of an adversary proceeding, noting that even if there were a legitimate basis for that argument, any procedural error would be harmless since all relevant parties had been served with adequate notice of the trial.[3] *See In re Felker*, 181 B.R. 1017, 1019 (Bankr. M.D. Ga 1995) and *trial transcript* at 17-18.

At the start of the trial it became apparent that the debtors had not complied with the pretrial order. Consequently, the court ruled that they were precluded from offering evidence in support of their objection at the trial. *See, e.g.,In re Gergely,* 110 F.3d 1448, 1452 (9th Cir.1997) (a bankruptcy court may appropriately exclude evidence for failure to comply with a pretrial order). As explained on the record, *see trial transcript* at 20-28, attached in Appendix A, a further consequence of their noncompliance was that the evidentiary burden had not shifted, and the presumptive validity of the bank's proof of claim was conclusive. *See Kimmons v. Innovative Software Designs, Inc. (In re Innovative Software Designs, Inc.)*, 253 B.R. 40, 44 (8th Cir. 2000) ("if an objection [to a proof of claim] is filed, the objecting party must then produce evidence rebutting the proof of interest or it will be allowed. If, however, evidence rebutting the proof of interest is brought forth, then the claimant must produce additional evidence to prove the validity of

[3]It was also noted that the debtors had previously filed an adversary complaint, 02-5034, to prosecute their objection the bank's claim. That complaint was dismissed on September 26, 2002 as redundant to the issue raised in the instant objection to the bank's claim, because the court did not need two documents to consider a single issue. *Trial transcript* at 15.

the claimed interest by a preponderance of the evidence.") (citations and internal quotation marks omitted); *In re Global Western Development Corp.*, 759 F.2d 724, 727 (9th Cir.1985) ("a properly executed proof of claim is sufficient to shift the burden of producing evidence and to entitle the claimant to a share in the distribution of the bankruptcy estate, unless the objector comes forward with evidence contradicting the claim.") (internal quotation marks omitted). *See also In re Central Rubber Products, Inc.,* 31 B.R. 865, 867 (Bankr. D.Conn. 1983) and *In re Hutter*, 207 B.R. 981, 989 (Bankr. D. Conn. 1997), *appeal dismissed,* case no. 3:97cv01049 (D. Conn. December 31, 1998) (Squatrito, J.).

On November 1, 2002, before the court had an opportunity to memorialize that bench ruling in a written decision, the debtors filed a motion to dismiss their second case, *see* § 1307(b), and simultaneously filed this third chapter 13 case, in violation of § 109(g)(2), which provides that:

> Notwithstanding any other provision of this section, no individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title;

On November 7, 2002, the court entered an order to show cause why to show why the instant case should not be dismissed with or without prejudice pursuant to §§ 105(a)[4] and 109(g)(2) and why

> sanctions should not be imposed against them pursuant to Rule 9011(b), F.R.Bankr.P. and §105(a), for having filed this case in violation of §109(g)(2) and/or in bad faith, and for having filed papers and motions in case no. 00-51236, including their October 30, 2002 motion to recuse, for the improper purpose of causing delay and/or frustrating the bankruptcy process.

Pursuant to the order to show cause, the bank and the debtors filed position papers and appeared at the November 21, 2002 hearing. The debtors conceded that they had

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[4]11 U.S.C. § 105(a) grants this court the authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," including the power to sanction those who are found to have commenced a case for an improper purpose or have otherwise frustrated the bankruptcy process.

violated § 109(g)(2) in dismissing their case and filing a new petition but asserted that the violation was an "honest error" on their part. *See November 21, 2002 hearing record* at 3:01. They further sought to withdraw their dismissal and thereby reinstate the previous case. *Id.* at 2:55, 3:02.

DISCUSSION

Although the debtors filed a motion to dismiss their second case, all they needed to do was file a request, as to which, "the court shall dismiss " the case. *See* §1307(b). Thus, subject to exceptions not applicable here, a debtor has an absolute right to dismiss a chapter 13 case. *See also Barbieri v. RAJ Acquisition Corp. (In re Barbieri)*, 199 F.3d 616 (2nd Cir. 1999). Notwithstanding its dismissal, however, the second case has not been closed, *see* Rule 5009, F.R.Bankr.P.,[5] and the court retains jurisdiction to impose sanctions for offensive conduct during the case. *See In re Donohoo*, 243 B.R. 536, 537 (Bankr. M.D. Fl. 1999) (Paskay, J.) (chapter 13 dismissal order amended to reserve jurisdiction to consider motion for sanctions); *Zwirn v. United Capital Corp. (In re French Bourekas, Inc.)*, 183 B.R. 695, 696 (Bankr. S.D.N.Y.1995) (dismissal of Chapter 11 case does not divest bankruptcy court of jurisdiction over core proceeding to determine sanctions), *aff'd,* 195 B.R. 19 (S.D.N.Y.1996). *See also Aheong v. Mellon Mortgage Co. (In re Aheong),* 276 B.R. 233, 239 (9th Cir. BAP 2002) (even after dismissal of a case the bankruptcy court retains ancillary jurisdiction to interpret and effectuate its orders.).

To hold otherwise would permit a litigant to frustrate a court's ability to issue a written decision on a matter decided on the record in court. The debtors' dismissal of the second case and simultaneous commencement of the third case was a thinly veiled attempt to avoid the obvious consequence of the trial and nullify the appeal process. *See Chapman v. Charles Schwab & Co., (In re Chapman)*, 265 B.R. 796, 824 (Bankr. N.D. Ill. 2001) (after chapter 13 debtor voluntarily dismissed his case pending a forthcoming unfavorable summary judgment ruling in an adversary proceeding, the court exercised its discretion to retain supplemental jurisdiction to complete the litigation), *aff'd*, *Chapman v. Charles Schwab & Co.*, 2002 WL 818300 (N.D. Ill 2002). *See also In re McKissie*, 103 B.R. 189, 191 (Bankr. N.D. Ill. 1989) (discussing strategic use of serial chapter 13 filings) and *In re*

[5]Even if the second case had been closed, it could be reopened for purposes of issuing and implementing this order. *See* Rule 5010, F.R.Bankr.P. and § 105(a).

Dyke, 58 B.R. 714, 716 n.1 (Bankr. N.D. Ill. 1986) (same; allegedly inadvertent second filing dismissed as bad faith).

For the foregoing reasons,

IT IS ORDERED THAT the third case, *i.e.*, case no. 02-51367, is DISMISSED with prejudice; and

IT IS FURTHER ORDERED THAT pursuant to Rule 11, F.R.Civ.P., made applicable here by Rule 9011, F.R.Bankr.P., and 11 U.S.C. §105(a), the debtors are SANCTIONED and shall, not later than February 28, 2003, pay the bank $6,589.50, which, on review of its statement of its attorney fees and costs, is the amount deemed reasonable,[6] and

IT IS FURTHER ORDERED THAT since this debt arises as an abuse of the bankruptcy process, it is intended to be nondischargeable in any reopened case or future bankruptcy case the debtors may commence.[7]

Dated at Bridgeport, Connecticut this 31st of December, 2002.

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Alan H. W. Shiff
Chief United States Bankruptcy Judge

[6]The bank sought $15,723.63 in legal fees and expenses for the debtors' alleged conduct. *See* Appendix B. The court has examined the bank's itemized costs and eliminated only those that preceded the petition date of October 5, 2000, or were not justified because the burden had not shifted. Thus, fees dated October 28, and 29, 2002, and the witness' travel expenses, are denied for services rendered in connection with the October 30, 2002 trial.

[7]A debt incurred by vexatious litigation or abuse of process may present a cause of action under § 523(a)(6) either as punitive tort damages or as a sanction. *See, e.g., In re Amaranto,* 252 B.R. 595, 600 (Bankr.D. Conn. 2000), *appeal dismissed*, 142 F. Supp. 2d 1029 (D. Conn. 2001); *In re Abbo*, 192 B.R. 891, 898 (Bankr.N.D.Ohio 1996); *In re Zelis*, 66 F.3d 205, 208 (9th Cir.1995) (sanctionable conduct required the plaintiffs to incur unnecessary litigation costs and attorney's fees; sanction award was nondischargeable under § 523(a)(6)). *See also* § 105(a). It is noted that this case does not raise the concerns of involuntary servitude addressed in *In re Flor*, 166 B.R. 512 (Bankr.D.Conn.1994), since there is no chapter 13 plan.